

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

9 THOMAS R. LORD, )  
10 Petitioner, ) 3:98-cv-00574-LRH-VPC  
11 vs. )  
12 E.K. McDANIEL, *et al.*, ) ORDER  
13 Respondents. )  
\_\_\_\_\_  
/

15 This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by  
16 petitioner Thomas R. Lord, a Nevada prisoner. Before the court is respondents' motion to dismiss  
17 (docket #104).

18 || I. Procedural History

19 Petitioner and co-defendant Donald James McDougal were charged by way of information in  
20 the District Court for Clark County with conspiracy to commit murder and/or robbery (count I),  
21 murder with the use of a deadly weapon (count II) and robbery with the use of a deadly weapon  
22 (count III) for offenses committed on October 5, 1988. Exhibit C.<sup>1</sup> Co-defendant McDougal was  
23 tried first, convicted of all three crimes, and was sentenced to life in prison with the possibility of  
24 parole for the murder conviction. Exhibit OO. After a jury trial, petitioner was convicted of  
25 conspiracy to commit murder and/or robbery, first degree murder, and robbery with the use of a

27       <sup>1</sup> The exhibits cited in this order are those filed by petitioner in support of his first amended  
28 petition for writ of habeas corpus and motion to reopen the case, and are located in the record at docket  
#18, 43 and 95.

1 deadly weapon. Exhibit M. The jury sentenced petitioner to death for the murder conviction.  
 2 Exhibits O and P. Judgment of conviction was entered on October 4, 1989. Exhibit Y. Execution  
 3 was stayed pending petitioner's appeal to the Nevada Supreme Court. Exhibit W.

4 Petitioner raised thirteen claims on appeal. Exhibit FF. The Nevada Supreme Court affirmed  
 5 petitioner's convictions, but reversed the death sentence and remanded for a new penalty hearing.  
 6 Exhibit OO. Remittitur issued on February 28, 1991. Exhibit QQ. On December 17, 1991, the  
 7 district court entered an amended judgment of conviction. Exhibit VV. Petitioner was sentenced as  
 8 follows: count I, six years in prison; count II, life in prison without the possibility of parole with an  
 9 equal and consecutive sentence of life in prison for the use of a deadly weapon; count III, fifteen  
 10 years in prison with an equal and consecutive sentence for the use of a deadly weapon. *Id.* Counts I  
 11 and III were to run concurrently to each other and consecutively to count II. *Id.*

12 Petitioner filed a state habeas corpus petition on December 17, 1992, alleging two grounds  
 13 for relief. Exhibit XX. On May 6, 1994 petitioner mailed an amended habeas corpus petition,  
 14 adding twelve grounds for relief in addition to the two he had argued in his original petition,  
 15 including the claim that trial counsel was ineffective for failing to investigate and present evidence  
 16 that co-defendant McDougal committed the crimes. Exhibit EEE. The trial court held an  
 17 evidentiary hearing over the course of three different days. Exhibits A-12 and A-13. McDougal  
 18 testified that he alone committed the crimes and that he was coerced into implicating petitioner. *Id.*  
 19 The trial court denied the petition, and found trial counsel was not ineffective. Exhibits A-13 and  
 20 MMM. Petitioner appealed, and the Nevada Supreme Court dismissed the appeal on May 19, 1998.  
 21 Exhibits NNN and NNNN.

22 Petitioner mailed a federal habeas petition to this court on September 27, 1998 (docket #7).  
 23 This court appointed counsel (docket #6) and an amended petition for writ of habeas corpus was  
 24 filed, arguing ten grounds for relief (docket #17). On December 28, 2001, this court found grounds  
 25 one, two, seven, nine, and ten of the petition were unexhausted (docket #47). This court denied  
 26 petitioner's request for a stay and ordered petitioner to either abandon the unexhausted claims or  
 27 voluntarily dismiss the petition. *Id.* Petitioner elected to abandon unexhausted claims (docket #49).  
 28 The remaining claims were denied on March 7, 2002 (docket #52). Petitioner appealed, and the

1 Ninth Circuit Court of Appeals found that this court erred in refusing to stay the proceedings while  
 2 petitioner returned to state court to exhaust his claims (docket # 69). The court vacated this court's  
 3 orders and instructed this court to allow petitioner to stay the proceedings. *Id.*

4 This court held a status conference on December 3, 2004 (docket #75). The parties discussed  
 5 whether the unexhausted claims would be procedurally barred if petitioner returned to state court in  
 6 order to exhaust the claims. *Id.* The court ordered the parties to brief the issues. *Id.* Petitioner  
 7 argued that a return to state court would be futile as another state habeas corpus petition would be  
 8 found to be untimely and successive (docket #78). Moreover, petitioner contended that it was not  
 9 likely that he would receive review on the merits, therefore this court should deem his claims to be  
 10 exhausted. *Id.* Finally, petitioner alleged that although his claims would be procedurally defaulted  
 11 in the state court, the court should excuse his procedural default as he could make a showing of  
 12 actual innocence. *Id.*

13 This court found that while federal courts could determine that claims are exhausted if it is  
 14 clear that the state courts will procedurally default the claims, in Nevada the state courts were  
 15 authorized to excuse procedural default under limited circumstances (docket #89 at 2). Moreover,  
 16 this court determined that petitioner's actual innocence claim was without merit. *Id.* at 7. The court  
 17 gave petitioner thirty days to either have grounds one, two, seven, nine, and ten dismissed from the  
 18 amended petition and allow the court to enter judgment against him or inform the court that he  
 19 wished to stay the proceedings. *Id.* at 8. Petitioner elected to return to state court to exhaust his  
 20 claims (docket #91). On June 20, 2005, the court dismissed the case without prejudice, and  
 21 administratively closed the case while petitioner returned to state court (docket #92).

22 Petitioner filed a second habeas corpus petition in the state district court. Exhibit A-29. The  
 23 state court held an evidentiary hearing, and denied the petition, finding that the petition was untimely  
 24 and successive. Exhibits A-32, A-33. The court further determined that petitioner had not made an  
 25 adequate showing of actual innocence and that he had not shown good cause and/or prejudice to  
 26 overcome the one-year time bar or to excuse the filing of a successive petition. Exhibit A-33. On  
 27 appeal the Nevada Supreme Court affirmed the lower court's denial of the petition. Exhibit A-39.

28 On December 20, 2006, petitioner filed a motion to reopen the case, alleging he had

1 completed his state court proceedings (docket #94). This court granted the motion to reopen and  
 2 order respondents to answer or otherwise respond to the remaining claims in the amended petition  
 3 (docket #99). Respondents filed a motion to dismiss and answer, arguing claims one, two, seven,  
 4 nine, and ten were procedurally defaulted in state court (docket #104). Petitioner filed a response  
 5 opposing the motion to dismiss (docket #111) and respondents filed a reply to that response (docket  
 6 #117).

7 **II. Procedural Default**

8 **A. General Principles**

9 Generally, in order for a federal court to review a habeas corpus claim, the claim must be  
 10 both exhausted and not procedurally barred. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir.  
 11 2003). Procedural default refers to the situation where a petitioner in fact presented a claim to the  
 12 state courts but the state courts disposed of the claim on procedural grounds rather than denying the  
 13 claim on the merits. A federal court will not review a claim for habeas corpus relief if the decision  
 14 of the state court regarding that claim rested on a state law ground that is independent of the federal  
 15 question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31  
 16 (1991). The *Coleman* Court stated the effect of a procedural default as follows:

17 In all cases in which a state prisoner has defaulted his federal claims in  
 18 state court pursuant to an independent and adequate state procedural rule,  
 19 federal habeas review of the claims is barred unless the prisoner can  
 demonstrate cause for the default and actual prejudice as a result of the  
 alleged violation of federal law, or demonstrate that failure to consider  
 20 the claims will result in a fundamental miscarriage of justice.

21 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural  
 22 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all  
 23 federal habeas cases. *See Koerner*, 328 F.3d at 1046.

24 **B. Procedural Default in the State Court**

25 In this case, there was a procedural default in state court. On the appeal from the denial of  
 26 petitioner's state habeas petition, the Nevada Supreme Court ruled:

27 Lord filed his petition approximately 14 years after this court  
 28 affirmed his conviction. Thus, his petition was untimely. [fn 3: NRS  
 34.726(1).] The petition was also successive. [fn 4: NRS 34.810(2).]

1 Because more than five years passed between the filing of the judgment of  
 2 conviction and Lord's filing of the instant petition, prejudice to the State is  
 3 presumed. [fn 5: *See* NRS 34.800(2).] Lord's petition is barred absent a  
 4 showing of good cause and prejudice [fn 6: *See* NRS 34.726(1); NRS  
 5 34.800(1)(b); NRS 34.810(1), (3).] or that "a constitutional violation has  
 6 probably resulted in the conviction of one who is actually innocent." [fn 7:  
 7 *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also Mazzan v. Warden*,  
 8 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).] "[A]ctual innocence" means  
 9 factual innocence, not mere legal insufficiency." [fn 8: *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).] To establish actual innocence, the petitioner must  
 10 show that "it is more likely than not that no reasonable juror would have  
 11 convicted him." [fn 9: *Id.* at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).]  
 12

13 Lord does not attempt to show good cause, instead claiming he is  
 14 actually innocent of the crimes. Lord bases his claim of actual innocence  
 15 on an affidavit executed by James McDougal, Lord's coconspirator in the  
 16 crimes. McDougal was also convicted by a jury for his participation in the  
 17 crimes, but his murder sentence includes the possibility of parole.  
 18 McDougal's affidavit states that he was "solely" responsible for the entire  
 19 incident," that it was "his fault in every way," and that Lord "had nothing  
 20 to do with the crime."

21 We conclude that McDougal's affidavit does not establish that no  
 22 reasonable juror would have convicted Lord. The robbery and murder were  
 23 charged under alternate theories of direct liability and aiding and abetting.  
 24 At the time of Lord's trial, McDougal had implicated Lord in the crimes.  
 25 McDougal did not testify at Lord's trial. Lord's appendix provides a few  
 26 short excerpts of McDougal's testimony at his own trial, in which  
 27 McDougal appears to testify he was with Lord and the victim before the  
 28 victim's death but does not remember much between that time and some  
 time later, when he woke up in the desert with Lord. At Lord's trial,  
 witnesses testified that Lord and McDougal were in the victim's truck two  
 hours after the victim's body was found; the victim's truck had numerous  
 bloodstains inside; McDougal, accompanied by Lord, tried to trade property  
 like that stolen from the victim for gasoline; and Lord had blood on one of  
 his boots that matched the victim's blood type, but not Lord's or  
 McDougal's. [fn 10: *Lord*, 107 Nev. at 31-32, 806 P.2d at 550.] Because  
 Lord has not established a colorable claim of actual innocence, his claims  
 were properly dismissed as procedurally barred.

29 Exhibit A-39. Thus, the dismissal of the second state post-conviction petition was affirmed by the  
 30 Nevada Supreme Court on the bases of state procedural rules.

31 **C. The Procedural Default Was an Independent and Adequate State Law Ground for  
 32 the Nevada Supreme Court's Disposition of Petitioner's Claims**

33 For the procedural default doctrine to apply, "a state rule must be clear, consistently applied,  
 34 and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005,  
 35 1010 (9th Cir. 1994). *See also Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129

1 (9th Cir. 1996).

2 NRS 34.726(1) has been held to be an independent and adequate state procedural rule that  
 3 will bar federal review. *See Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000); *Moran v.*  
 4 *McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996). Furthermore, the Ninth Circuit Court of Appeals  
 5 has also found NRS 34.810(2) to be an independent and adequate state ground. *See Vang v. Nevada*,  
 6 329 F.3d 1069, 1074-75 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999). This court  
 7 finds that the Nevada Supreme Court's holding that petitioner's second state habeas petition was  
 8 procedurally barred under NRS 34.726 and 34.810 was an independent and adequate ground for the  
 9 court's denial of the state habeas petition.

10 **D. Cause and Prejudice or Fundamental Miscarriage of Justice**

11 To overcome a procedural default, a petitioner must establish either (1) "cause for the default  
 12 and prejudice attributable thereto," or (2) "that failure to consider [his defaulted] claim[s] will result  
 13 in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations  
 14 omitted).

15 Petitioner does not argue cause and prejudice to overcome procedural default, but instead  
 16 asserts that his conviction constitutes a fundamental miscarriage of justice as he is actually innocent  
 17 (docket #111 at 10-11). Specifically, petitioner contends that he has consistently maintained his  
 18 innocence. Moreover, petitioner points to the affidavit signed by his co-defendant that states only  
 19 McDougal committed or is responsible for the murder. Petitioner asserts that the affidavit is new,  
 20 reliable evidence.

21 A petitioner can meet the fundamental miscarriage of justice standard when he shows "actual  
 22 innocence," or new evidence presented to the court which raises a sufficient doubt as "to undermine  
 23 confidence in the result of the trial." *Schlup v. Delo*, 513 U.S. 298, 317 (1995). Under *Schlup*,  
 24 actual innocence is established when, in light of all of the evidence, "it is more likely than not that no  
 25 reasonable juror would have convicted [the petitioner]." *Bousley v. United States*, 523 U.S. 614, 623  
 26 (1998) (quoting *Schlup*, 513 U.S. at 327-28). The petitioner must establish his factual innocence of  
 27 the crime, and not mere legal insufficiency. *Id.*; *Jaramillo v. Stewart*, 340 F.3d 877, 882-83 (9th Cir.  
 28 2003). Moreover, "[t]o be credible, [a claim of actual innocence] requires petitioner to support his

1 allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific  
 2 evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at  
 3 trial.” *Schlup*, 513 U.S. at 324; *Calderon v. Thompson*, 523 U.S. 538, 559 (1998).

4 Petitioner has previously raised this same claim of actual innocence in these proceedings  
 5 (docket #78). There is no indication that petitioner is raising a new claim or fact that this court has  
 6 not previously considered. This court, in its April 25, 2005 order, assessed whether McDougal’s  
 7 claim that petitioner did not commit the crimes was reliable, and determined that the affidavit was  
 8 unreliable and that no evidentiary hearing was necessary (docket #89). Moreover, this court found  
 9 petitioner’s actual innocence claim to be without merit. *Id.*

10 This court again reviews the record and finds that petitioner has not met the standard for  
 11 actual innocence to show that his conviction is a fundamental miscarriage of justice. At trial  
 12 evidence was introduced to show that the victim was found in the bushes off of Interstate 15 in  
 13 Nevada with multiple stab wounds. Exhibits ZZZZ through A-2. Petitioner and co-defendant  
 14 McDougal were found in California driving the victim’s pickup truck on the same highway. The  
 15 manager of a service station testified that two attempted to steal gas, and then McDougal offered to  
 16 exchange a gold ring for the gas. The victim’s mother testified that her son wore a gold ring. The  
 17 service manager impounded the truck to pay for the gas and petitioner and McDougal walked into  
 18 the desert. They were arrested the following day.

19 Furthermore, it was established that the victim’s truck had numerous blood stains in it, and  
 20 that Lord had blood matching the victim’s blood type on his boots. The blood did not match his or  
 21 McDougal’s blood-type. Furthermore, a boot print near the scene where the body was found was  
 22 similar to the boots that petitioner wore.

23 McDougal gave a statement to police that both he and petitioner stabbed the victim. Exhibit  
 24 A-3. At his own trial McDougal testified that he went with the victim and petitioner to a store to buy  
 25 beer, and then remembers waking up in the desert. Exhibit A-24. McDougal stated that he had no  
 26 memory of any of the events. *Id.* In the affidavit McDougal states:

27 Mr. Thomas R. Lord had nothing to do with the crime of which we both  
 28 were convicted of in this case. I am solely responsible for the entire  
 incident. As a man, I admit the whole incident was my fault in every way.

1                   It is my responsibility as a human being to tell you that Mr. Lord played not  
 2                   part in this crime whatsoever.  
 2 (docket #78).

3                   This claim that McDougal acted alone is not a new claim. In 1995 the state district court held  
 4                   an evidentiary hearing on petitioner's claim that trial counsel was ineffective for failing to  
 5                   investigate and present evidence that McDougal committed the crimes. Exhibit A-12, A-13. At the  
 6                   hearing McDougal testified that he acted alone, and was coerced into making his statement to police.  
 7                   *Id.* McDougal stated that the person with him at the service station, misidentified as petitioner, was  
 8                   a hitchhiker who looked similar to the petitioner. Exhibit A-13 at 24-20. However, McDougal  
 9                   admitted he never told police about this hitchhiker. Exhibit A-13 at 31. Furthermore, when asked  
 10                   about why he used the pronoun "we" in his statement to police when discussing the crimes instead of  
 11                   "I" if he had committed the crimes alone, McDougal offered no credible explanation. *Id.* at 38-42.

12                   Even if McDougal's affidavit can be considered "new" evidence, his claims that he acted  
 13                   alone in committing the crimes are not reliable. There is no need to test McDougal's credibility at an  
 14                   evidentiary hearing as the record contains sufficient evidence upon which to assess McDougal's  
 15                   credibility. Petitioner has not established his factual innocence in this case. The court finds that  
 16                   McDougal's "new" testimony is not sufficient, when considered in light of all of the evidence  
 17                   presented at trial, to show that it is more likely than not that no reasonable juror would have  
 18                   convicted petitioner.

19                   The court will grant respondents' motion to dismiss, as petitioner's claims were procedurally  
 20                   defaulted in the state court. Petitioner has not shown that the failure to consider his claims on the  
 21                   merits will result in a miscarriage of justice.

22 **III. Certificate of Appealability**

23                   In order to proceed with an appeal from this court, petitioner must receive a certificate of  
 24                   appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a substantial showing of  
 25                   the denial of a constitutional right" to warrant a certificate of appealability. *Id.* The Supreme Court  
 26                   has held that a petitioner "must demonstrate that reasonable jurists would find the district court's  
 27                   assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484  
 28 (2000).

1       The Supreme Court further illuminated the standard for issuance of a certificate of  
2 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

3       We do not require petitioner to prove, before the issuance of a COA, that  
4 some jurists would grant the petition for habeas corpus. Indeed, a claim  
5 can be debatable even though every jurist of reason might agree, after the  
6 COA has been granted and the case has received full consideration, that  
7 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court  
8 has rejected the constitutional claims on the merits, the showing required  
9 to satisfy § 2253(c) is straightforward: The petitioner must demonstrate  
10 that reasonable jurists would find the district court’s assessment of the  
11 constitutional claims debatable or wrong.”

12       *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

13       The court has considered the issues raised by petitioner, with respect to whether they satisfy  
14 the standard for issuance of a certificate of appeal, and the court determines that none meet that  
15 standard. Accordingly, the court will deny petitioner a certificate of appealability.

16       **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss (docket #104) is  
17 **GRANTED**. The Court finds grounds one, two, seven, nine, and ten were procedurally defaulted in  
18 state court and that petitioner has not made a showing that his conviction amounts to a fundamental  
19 miscarriage of justice.

20       **IT IS FURTHER ORDERED** the first amended petition (docket #17) is **DISMISSED**  
21 **WITH PREJUDICE**.

22       **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of appealability.  
23       DATED this 27th day of July, 2008.

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26       LARRY R. HICKS  
27       UNITED STATES DISTRICT JUDGE  
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